Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

JOYCE E. ROWLEY

Petitioner

v.

CITY OF NORTH MYRTLE BEACH, S.C.
ET AL.

Respondents

On Petition for Writ of Certiorari
To the Fourth Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

Joyce E. Rowley
Pro Se
PO Box 30343
Acushnet, MA 02743
774.328.4459

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ERRATA SHEET

(To replace pages 29 and 30)

Questions Presented for Review

1. Did the Fourth Circuit Court of Appeals err by affirming the U.S. South Carolina District Court decision as it was inconsistent with stare decisis where the lower court dismissed her consolidated cases for sanctions when Defendants were in default and so violated Petitioner's substantive and due process rights?

2. Was the Fourth Circuit Court of Appeals' affirmance of the South Carolina District Court's decision inconsistent with stare decisis where the lower court's decision violated Petitioner's 7th Amendment Constitutional right to a jury by trial when her employment discrimination claims were dismissed for sanctions although she demonstrated that her claims had merits?

List of Parties

City of North Myrtle Beach, South Carolina;

John Smithson, City Manager
Individually and in his official capacity;

Kevin Blayton, Director of Public Works,
Individually and in his official capacity;

Cathy E. Maddock, Personal Representative for the Estate of
Douglas Maddock substituted for Douglas Maddock,
Former Director of Planning and Development
Individually and in his official capacity;

Joel A. Davis, Former Assistant City Manager,
Individually and in his former official capacity;

The Assistant City Manager and the Director of Planning &
Development, in their official capacities as substituted.

Corporate Disclosure

Petitioner is not a corporation

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

Opinions Below and References

Fourth Circuit Court of Appeals

09-1993, 09-2001

Opinion on Appeal December 16, 2009

South Carolina District Court

4:06-cv-1873 and 4:07-cv-1636

Order August 23, 2009

JURISDICTION

Petitioner respectfully prays that a writ of certiorari issue to review and vacate the opinion of the Fourth Circuit Court of Appeals issued on December 16, 2009. A timely petition for rehearing was filed on December 30, 2009 and denied on January 26, 2010. This petition is timely filed.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Service has been provided to defense counsel as noted in the declaration pursuant to 23 U.S.C. §1746.

This Court also has jurisdiction over the matters as pertains to violations of the Seventh Amendment of the United States Constitution.

STATEMENT OF CASE

Joyce E. Rowley, Petitioner pro se, was employed for six years as Principal Planner, head of the Planning division, for the City of North Myrtle Beach, South Carolina. In the winter of 2003-2004, she opposed unfair hiring practices that eliminated minority and women candidates for the Site Planner position, a position that she supervised. In particular, a foreign national candidate was eliminated under the guise of "Homeland Security." Rowley was terminated in February 2005, and she contended that her termination was in retaliation for her protected activities and that she was subject to discriminatory discipline and discharge based on her gender.

Ms. Rowley filed federal claims of discrimination and retaliation under Title VII of the 1964 Civil Rights Act, 42 U.S.C. §2000e, and related South Carolina Freedom of Information Act claims in June 2006 in the U.S. District Court of South Carolina. She filed an amendment on December 4, 2006 which included 42 U.S.C. §1983 and Fourteenth Amendment Constitutional claims. In February 2007, she filed

her second case, State claims for wrongful termination in violation of public policies and fraud and deceit in Horry County Court of Common Pleas in February 2007. The State claims were removed and consolidated with the federal case in August 2007. This consolidated case is among five federal discrimination cases filed against the City of North Myrtle Beach, South Carolina between 2004 and 2009. At the helm as Personnel Director since 1989, and as City Manager since 2003, has been Defendant John Smithson. Defendant Joel Davis, the Assistant City Manager and Personnel Director from 2004 to 2008, accrued five EEOC discrimination complaints against him and three discrimination lawsuits in his short tenure–including one in which he tested contract personnel on their ability to speak English.

Ms. Rowley worked in an environment that allowed Defendant Maddock to hire based on race and gender, and then retaliate against her after she opposed it and reported it to Defendant Smithson. It allowed Defendant Blayton to push for

her termination simply because he disagreed with information she presented at a public meeting, although it was her job to do so. That environment continues today at the City, as evidenced by the most recent gender discrimination lawsuit filed in 2009, strengthened by a system that does not hold it accountable.

The procedures in Ms. Rowley's cases took peculiar twists. There have been three reports and recommendations, dispositive motions that were ignored out of sequence for half a year, and in particular, defendants' defaults in both cases were either not reviewed under the appropriate federal rule, or not reviewed at all. Twice the court refused to enter default.

It began with the May 30, 2008 granting of defendants' untimely motion to compel Ms. Rowley's deposition and extend discovery after the close of discovery. Local Rule 6.01 D.S.C. and long established case law for the district, Bachman v. Lowenstein (1979), as cited by Wright & Miller Federal Practice and Procedures 2d Civil §1381, requires an extraordinary showing for filing past the close of discovery.

Defendants had not offered any reason why their pleading was filed after the close of discovery. Instead, the court borrowed from a hearing on a different motion and inaccurately stated that Ms. Rowley had not provided all documents during discovery when granting the motion.[1]

It continued with the court's failure to enter the first default on June 24, 2008. Defendants admitted they were in default for nearly two years on the first case in their pleading to file an Answer out of time (dkt. 240 in case no. 4:06-1873) on June 6, 2008. According to defendants, they should have filed by May 2007. Ms. Rowley contends that they should have filed by October 27, 2006–or 580 days previously. Ms. Rowley moved for entry of default and default judgment on June 24, 2008 but the court refused to enter the default. Instead, on June 25, 2008 the district court *sua sponte* granted an extension to defendants so they could depose her. Although she had

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[1]This error persisted to the final order for dismissal, despite Ms. Rowley's submittal of Defendants' letter stating she had provided the documents in question dated January 2008.

informed the defendants she would not be able to attend due to work, and she had moved for a stay on other grounds, it is unclear how the court made the decision to extend the time to depose her. Defendants had not filed a renewed motion to compel.

The court then recommended a motion to dismiss for sanctions be granted when Ms. Rowley could not attend the deposition granted by extension, again due to work obligations[2]. This first Report and Recommendation, issued August 22, 2008, did not review or consider Defendants' motion to file an answer 580 days late or in the alternative to partially dismiss, Ms. Rowley's motion for default judgment or Ms. Rowley's declaratory judgment on FOIA claims.

On October 31, 2008, the court adopted the report's alternative recommendation, and allowed defendants yet another opportunity to depose Ms. Rowley and awarded fees and costs to the defendants. It did not acknowledge their

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[2]Ms. Rowley resides and works in Massachusetts, and defendants did not confer to schedule the deposition.

default although it was raised in objections. Defendants had not requested the deposition.

The pattern of irregular decision-making continued. Six months later, on February 23, 2009, the district court filed a second Report and Recommendation on the June 6, 2008 default, and the July 2008 motion for declaratory judgment. The court argued on behalf of defendants that the first default was cured by the filing of an answer in the second case, and so was moot.

The court adopted the second report, although Ms. Rowley had objected that the second Answer had not been served, and so under Federal Rules of Civil Procedure 5(a), the default was not cured but compounded.

In March 2009, the magistrate judge then awarded $11,985.44 in fees and costs to defendants as part of the sanctions ordered in October 2008. Defendants had not providing case law to justify their fees, but the court argued on their behalf various cases to satisfy the lodestar analysis for

fees required under Barber v Kimbrell and Local Rule 54.02 D.S.C.. When Ms. Rowley objected that the court had not considered her ability to pay, as required under Barber, and in fact she could not afford it, her objections were overruled by the court solely because she was working.

On May 1, 2009, Ms. Rowley then filed the second motion for default judgment under Federal Rules of Civil Procedure Rule 55 because defendants had still not served her the answer to the second complaint. In response, defendants provided new legal defenses and failed to provide some defenses to claims and so were admitted.

Defendants also presented several new declarations which contradicted earlier statements to EEOC in 2006 and to her interrogatories in 2007 and 2008[3]. For example, Defendant Smithson now claimed that Maddock wasn't involved–although Maddock died in 2007 and could not be questioned on this. Previously, he claimed to have talked to the City's Mayor, to

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[3]Ms. Rowley filed seven motions to compel, and prevailed on four. The interrogatories were subject to an order of compulsion.

Maddock, and to Davis about terminating Rowley after receiving Blayton's email. In addition, as a meritorious defense, the response stated that the City could not be held liable to the extent that Smithson had acted with discriminatory motives. However the response only created a shared liability, not a nullity.

Again the court deviated from procedures on dispositive motions. It issued a third Report and Recommendation on June 1, 2009, but did not review the dispositive motion for the second default judgment. Because the court was noticed that the first default had not been "cured" by the second Answer, both defaults were outstanding. Instead of addressing either default, or the motion for default judgment, or entering the formal filing for default on June 1, 2009, the court recommended granting defendants' final motion to dismiss for sanctions as Ms. Rowley had been unable to pay the nearly $12,000 or attend the deposition. And, although defendants did not cite any law under which Ms. Rowley's cases

should be dismissed in their motion, the court provided it in its report as being Federal Rule 37(d) and Rule 41(b).

The district court adopted the recommendation, dismissed Ms. Rowley's cases for sanctions, and ordered all other motions, including the second default, moot on August 23, 2009. Again, there was no mention of either default, nor analysis under Rule 55 of the second default.

Ms. Rowley timely appealed these matters to the Fourth Circuit Court of Appeals. The appeal noted additional errors relating to discovery not included in this petition. A panel of the Circuit Court affirmed the decision on December 16, 2009. The Circuit Court stated that the arguments Ms. Rowley raised were without merit, and "in most instances, the issues related to those orders had no bearing on the court's decision to dismiss the cases." Ms. Rowley filed a timely petition for rehearing en banc. Her petition for rehearing was denied on January 26, 2010.

As a result of the district court's failure to follow rules and case law in these matters, Ms. Rowley's due process and substantive rights were violated. Further, as will be argued below, the Fourth Circuit Court of Appeals panel issued a decision not in keeping with its own prior opinions or this Court's decisions.

Petitioner prays pursuant to Rule 10(a) that the Supreme Court review the South Carolina District Court's decisions which represent a departure from established procedure and law and the Fourth Circuit's sanctioning of those same decisions.

ARGUMENT

If the court reporting system is to be useful at all, it must be based on the truth. If the Federal Rules of Civil Procedure are to be of any legal force, they must be enforced. To read the orders deciding these cases and all three reports and recommendations which were published in Westlaw, it would appear that Ms. Rowley did nothing at all to prosecute her claim and was simply another pro se litigant who failed to attend her deposition.

Knowing the truth of the matter makes all of the other cites of pro se litigants whose cases were dismissed for sanctions highly suspect. Can they be relied on as case law, knowing that here defendants were in default for nearly two years but prevailed anyway, without the requisite review under Rule 55? And knowing that the court refused to make an entry of default, not once, but twice? Or that the court chose to omit any analysis of the second default when sanctioning Rowley and dismissing her cases?

Because if the court had followed the rules and followed the law, it could not have granted the untimely motion to compel. And it could not have extended the time to depose, ordered a deposition, ordered payment of $12,000 in sanctions, or dismissed her cases while defendants were truly in default.

The purpose of the rules is to impose fairness in litigation and ensure impartiality. To allow this far a departure from the rules and the law as established by the Supreme Court is to encourage the abandonment of a fair and impartial judicial system.

Under the doctrine of stare decisis, the Fourth Circuit Court panel's decision should not be allowed to stand. Only a panel en banc can offer an opinion that is inconsistent with a prior panel opinion of the same circuit (2A Federal Procedure L Ed §3:792). Departure from precedent must be supported by some special justification (Id 3:790). But more to the point, under that same doctrine, *no* panel opinion should be inconsistent with the Supreme Court decisions.

Argument for Question 1.

A. The Panel opinion erred in its affirmance of the lower court decision because that decision conflicts with published opinion in its own Circuit regarding entry of default and default judgment in both cases under Federal Rule of Civil Procedure Rule 55; and as a result, default should have precluded dismissal.

It is clearly established that a motion for default judgment is determined by use of Federal Rule Civil Procedure Rule 55 analysis. Under Rule 55(a), entry of default, the court looks at whether they have "otherwise defended" if an answer has not been properly served (Federal Rule of Civil Procedure Rule 55). In the Fourth Circuit, Rule 55 is used judiciously to prevent judgment against a blameless party (Lolatchy v. Arthur Murray Dance Studio, Inc. quoting United States v. Moradi). However, it has at least two prongs–that there is a reasonable diligence in seeking to set aside the default and that the defaulting party provides a meritorious defense. In

reviewing the motion for default judgment, the court will use Rule 60(b) as a test to determine whether an order would be set aside in the future (Wright & Miller 2d Civil §2692:88). Those additional criteria are whether defendants were diligent, the personal responsibility of the defaulting party, prejudice, history of dilatory actions, and availability of other sanctions (Lolatchy).

Lolatchy has been upheld by the Fourth Circuit in Heynes v MC Marketing ("...party blameless for attorney's negligence is deemed "mistake" under Rule 60(b)); Malhorton v. KCI Technologies ("...warning a salient fact in which default judgment appropriate"); Payne v. Brake and Carbon Fuel v. CSX in which the Fourth Circuit performed the review *de novo*.

Here, Rowley first noticed the court in April 2007 that she believed defendants should have answered her amendment to the first complaint. The court refuted it at the time. However, when defendants acknowledged the default in their pleading in 2008, she immediately filed a motion for default

judgment and consistently noticed the court with each subsequent pleading that defendants were in default.

Rowley provided evidence of defendants' lack of meritorious defenses and failure to litigate from the beginning. Examples included a one-paragraph response to plaintiff's interrogatories and RDPs, failure to provide complete responses, failure to respond to a subpoena duces tecum, and other production failures requiring seven motions to compel. But these are dwarfed by the fact that defense counsel repeatedly refused to acknowledge that one defendant, Davis, left the City in April 2008 and to date has not provided information on where Defendant Davis is currently residing and working. The court was made aware of Davis' absence as far back as May 8, 2008 when it was raised at hearing. A motion to substitute was made in April 2009 but deemed "moot" by the court.

In disposing of the first default, the district court's second Report briefly touched on Lissau v. Southern Food

Services as a complete defense in a footnote in February 2009. Marvel v. Birkbeck Lighting, an ADEA case on which Lissau rests, involved a situation where a supervisor would have been held liable under the 1991 Amendment to the Civil Rights Act but the owner of the store would not be liable due to the number of employees. As the Fourth Circuit opined that there may be cases where supervisors can be held liable for discrimination (Birkbeck, 510).

Here all of the defendants supervised the requisite 15 employees under Title VII, and the City employs 440 people. There is no inequity in holding the supervisors in this case liable. Instead, allowing them to escape liability under Lissau promotes a system where the City can claim lack of respondeat superior liability while the supervisors discriminated with impunity. In fact, that is exactly what defendants attempted to claim in its response to the second motion for default judgment.

Because of the lack of review under rule 55 for the first default, the lack of any review in the second default, the district

court found in favor of defendants. Had the court followed the law on default, it could not have dismissed her cases.

The Panel's opinion that no order would have had a bearing on the dismissal overlooked the defendants' defaults. Clearly, the court intentionally omitted the default when it extended the time for deposition in June 2008, recommended dismissal in August 2008, and ordered monetary sanctions and another chance to depose Ms. Rowley in October 2008. With all of the defendants in default, there was no controversy over which to depose Ms. Rowley. Had the district court followed rules, it could not have ordered the sanctions which led to dismissal.

Neither the panel nor the district court provided special justification for this significant departure from so many federal rules and procedures. Not only was there no special justification for this, but defendants hadn't requested the last two depositions–in particular, the ones that caused Ms. Rowley's cases to be dismissed.

Argument for Question 2.

The Fourth Circuit Panel opinion and South Carolina District Court decisions are in conflict with Supreme Court and Fourth Circuit Court opinions on dismissal for sanctions.

The district court and the panel's opinion are in conflict with the United States Supreme Court's decision with regards to Societe Internationale pour Participations Industrielles et Commerciale, SA v Rogers and in the Fourth Circuit with Wilson v. Volkswagen of America, Inc., Zornes v. Specialty Industries, and Mutual Federal Savings and Loan Associaton v. Richards & Associates.

In Wilson, as in Societe, the Fourth Circuit Court noted that although the power to impose sanctions is discretionary with the trial court, it is not discretion without bounds or limits. In particular, it should never be used when the failure to comply has been due to inability, and not to willfulness of the noncomplying party.

In other Circuits, this tenet is upheld also. In the Ninth Circuit in Dunn v. Trans World Airlines, in the Eleventh Circuit in Searock v. Stripling where a "finding of extreme circumstances [is] necessary to support discovery sanction of dismissal..." and not the party's inability to comply with such order. In the Sixth Circuit case, the court had proof from plaintiff's attorney that she did not intend to comply and did not turn over all documents before dismissing her case (Bass v. Jostens, Inc.), as was the case in the Fifth Circuit in Doe v. American Airlines, where the plaintiff had indicated she had no intention of complying and so her case was dismissed.

Academic writings on the matter concur that Rule 41(b) is inappropriate for dismissal and that Rule 37 is the sole means for sanctioning failure to appear for a deposition, including monetary sanctions and dismissal of claims (Wright & Miller, 2d Civil §2282, p 603). Rule 37(d) is only to be used when a party is "unjustifiably resisting" or attempting to evade discovery (Advisory Committee Note 48 FRD at 538). In order

to secure sanctions, the party must move to compel under Rule 37(a) (Wright, §2282).

The elements cited above for dismissal as sanction simply weren't present in this case. The final order of the district court stated that Rowley's conduct had prejudiced Defendants, that she had "failed to provide documents to the defendants after defense counsel made arrangements for her to do so;" that her prior appeal was an attempt to circumvent the Orders of the Court, and that the consolidated actions could not go forward "without the testimony of the plaintiff." The district court found the noncompliance inexcusable, stated that she had ample warning of consequences; and that she had not provided persuasive reasons for her "abject failure to properly prosecute her case."

The Fourth Circuit panel affirmed the ruling without touching on the issues of document production or Rowley's participation in discovery which were clearly in error. These two components of the decision were necessary to meet the test

of Societe and Wilson. Without the refusal to participate in discovery or willful behavior, dismissal for sanctions are inequitable.

In Chandler Leasing Corp. v. Lopez, the Circuit held that dismissal with prejudice is a harsh sanction which should not be invoked lightly, and in reviewing such a dismissal, the Court of Appeals must ascertain the degree of personal responsibility of plaintiff, amount of prejudice caused defendant, existence of a drawn-out history of deliberately proceeding in a dilatory fashion, and existence of a sanction less drastic than dismissal. The Panel did not perform any review of these factors in this matter.

First, Ms. Rowley notes that these criteria apply assuming that defendants are not in default. Here, where defendants were in default since October 27, 2006 on the first complaint, and then since June 20, 2008 on the removed second case, all of the depositions which Ms. Rowley was sanctioned for occurred after the defaults.

In Mutual, quoting Wilson, the Fourth Circuit stated:

> "Such an evaluation will insure that only the most flagrant case, where the party's noncompliance represents bad faith and callous disregard for the authority of the district court and the Rules, will result in the extreme sanction of dismissal or judgment by default."
>
> (Wilson, at 504).

This is not such a case. The record is equally clear that Ms. Rowley did not miss a single deadline for any filing or fail to comply with the 39 court orders with one exception–the order for her to pay $12,000 in sanctions on April 13, 2009 and then to attend a deposition on April 17, 2009. These were the only sanctions offered other than dismissal. Her failure was due to inability to pay sanctions and attend the deposition–not willful refusal.

It is also undisputed that Ms. Rowley participated fully in discovery–holding a Rule 26 initial discovery conference, submitting initial disclosures, responding to interrogatories and RDPs, requesting subpoenas, conducting depositions, submitting 630 documents in response to a request for

documents, filing seven motions to compel and prevailing on four, attending two motion hearings and two telephone conferences with the court, and providing pre-trial disclosures three times–the latter being something defendants refused to do on all three occasions scheduled by the court. She even traveled to a California audio forensic laboratory and supplied the court with its report that the audio tapes regarding her deportment presented to EEOC and herself by defendants had been altered.

This Court has held that dismissal is not warranted if the plaintiff has a strong case. Instead, disposition on the merits is encouraged. Then, the Court stated:

> "These decisions establish that there are constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause. The authors of Rule 37 were well aware of these constitutional considerations."
> (Societe 209)

In dismissing her cases, the district court did not consider that she had proven her prima facie case against the

City for discriminatory discipline, resignation in lieu of termination, discriminatory discharge and wrongful termination. In her pretrial disclosures, Rowley had supplied ample evidence that she would prevail if allowed to go to trial. These included:

- Her memo to Smithson and Maddock dated January 27, 2004 noting that there were 8 qualified candidates overlooked in favor of a white male who was not qualified for the position of a site planner;
- Notes and comments regarding the "community panel" that Smithson formed in response to her complaint that Maddock was making a racially-based and unlawful hiring decision in 2004;
- The motion in limine by Defendant City to withhold a statement by the Parks & Recreation Director that "this was a white community" that wouldn't tolerate African American children in their basketball leagues in the 2004 federal race-based discrimination and retaliatory

discharge suit against the City of North Myrtle Beach;

- Proof of Maddock's retaliatory action in his September 2004 email stating he had told the white male Site Planner to document her within one month of hiring him;
- Davis' September 10, 2004 memo stating that the issues in the only write-up she had ever received "had been dispensed with";
- Davis' February 23, 3005 memo telling her to change her behavior or she would be terminated written one day after the decision to terminate was made and handed to her at her termination on February 24, 2005;
- The memo to David King, Director of Public Safety, offering him resignation in lieu of termination;
- The five EEOC complaints against Davis in his short three years with the City–in addition to the lawsuit filed for his interrogation of consulting personnel to determine if they could speak English;
- Recommendations from the North Myrtle Beach Planning

Commission on her performance at the time of her firing;

– Acting Planning Director Paul Blust's testimony at deposition that her behavior at the meeting cited as cause for her termination was professional and not inappropriate as Smithson alleged;

– The forensic report from a certified laboratory showing that the audio tapes of the City Council meeting at which Rowley's deportment was "inappropriate" and which supposedly caused her termination as submitted to EEOC by defendants had been altered.

She also showed that she had tried to mitigate her damages, had submitted over 110 applications and resumes both in and out of her profession, and that she had found some work, but none comparable or suitable to her position with the City of North Myrtle Beach.

Ms. Rowley's well-pled claims were never refuted, except by defendants' self-serving declarations dated four years after her termination filed in response to her second motion for

default. No other witnesses nor affidavits were ever provided to substantiate the purported reason for her dismissal.

As of this writing, Defendant Smithson, the City Manager, has stepped down amidst the firestorm created by yet another two retaliatory discharges. Although he claims to have planned on leaving, it comes within a week of receiving audio tapes from the most recent federal gender discrimination suit.

Those audio tapes recounted his and Defendant Davis' retaliatory and discriminatory employment practices, as reported in The Sun News[4]. The tapes recorded a conversation between high ranking public safety officials that David King, the former Public Safety Director, was fired in retaliation for complaining about Defendant Davis. "Just like I told King, I said [Davis] was sent here to do one thing, and that's cut your throat," one official was quoted as saying. King's lawsuit claimed retaliatory discharge for reporting sexual harassment of employees by Defendant Davis.

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[4]The Sun News, "North Myrtle Beach tapes affirm culture of silence", February 4, 2010, David Wren.

The most recent gender discrimination lawsuit claims that there was gender discrimination in hiring and promotion (C.N. 4:09cv0250), similar to Ms. Rowley claims in her original case in June 2006.

CONCLUSION

For nearly four years, Ms. Rowley fought for her civil rights in the lower courts. Her story has not changed, and she did not waver in her belief that the City of North Myrtle Beach and its management staff violated the Civil Rights Act with impunity. It is an impunity borne of knowledge that they will always prevail at the district court. Ms. Rowley's case is one of five federal discrimination lawsuits in the past five years–all but one claiming retaliatory discharge in violation of the Civil Rights Act of 1964.

However, the difference between this case and all of the proceeding cases and cites is that here, Defendants were already admittedly in default twice yet they prevailed. The district court's first report and recommendation for dismissal

came without mention of the default but with the court's full knowledge of it. A year later, the final order to dismiss as sanctions was also issued with full knowledge that defendants were in default, now in both cases. The Fourth Circuit affirmance absent any analysis of either of the two defaults by either court was in conflict with federal rules and case law. If the courts allowed the default to stand, the City of North Myrtle Beach and its management staff would have to admit that they discriminated on the basis of race and gender in hiring, promotions and firing, and retaliated against anyone who reported it to them.

The lower court's refusal to enter the defaults and rule on both defaults according to standards established by this Court robbed Ms. Rowley of her right to compensatory and punitive damages. Not only were her due process rights under the Fourteenth Amendment intentionally abrogated, so was her Seventh Amendment right to a jury determination of those damages. The court salted the wound when it sanctioned her

for her inability to attend a deposition that defendants did not request and directed her to pay sanctions to defaulted defendants. That the court then dismissed her cases as a sanction for not attending yet another unrequested deposition while defendants were still in default, and for failure to pay fees the court knew she couldn't afford to those same defaulted defendants, is anathema to a fair and impartial system of laws.

Petitioner seeks a writ of certiorari for review of the Fourth Circuit Court of Appeals' decision affirming the district court decision as a matter of justice. Further, Petitioner prays that this Court vacate the panel opinion and the district court's dismissal and grant default judgment for the reasons set forth above.

Respectfully submitted,

Joyce E. Rowley
Petitioner, Pro Se

Dated this 10th day of March, 2010.

LIST OF COUNSEL

FOR RESPONDENTS:

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APPENDIX

In order of appearance:

4th Circuit Court of Appeals Decision December, 16, 2009

Order (296,405*), August 23, 2009

Motion for Default Judgment (151,254), June 24, 2008

Order (153,258), Extending Time, June 25, 2008

Second Report & Recommendation, Excerpted as to ruling on Default Judgment (219,319), February 23, 2009

Plaintiff's Objxns to Second Report, Excerpted as to rulings on Default Judgment (223,324), March 10, 2009

Order (228,329), March 16, 2009

Motion for Default Judgment (257,365), May 1, 2009

*Docket numbers are from Case no. 4:07cv1636 first, then 4:06cv1873.

UNPUBLISHED

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 09-1993

JOYCE E. ROWLEY,

Plaintiff - Appellant,

v.

CITY OF NORTH MYRTLE BEACH; JOEL DAVIS, Individually and in his capacity as employee of the City of North Myrtle Beach; KEVIN BLAYTON, Individually and in his capacity as employee of the City of North Myrtle Beach; JOHN SMITHSON, Individually and in his capacity as employee of the City of North Myrtle Beach; PLANNING AND DEVELOPMENT DIRECTOR FOR THE CITY OF NORTH MYRTLE BEACH; CATHY E. MADDOCK, Personal Representative of the Estate of Douglas Maddock, personal representative Douglas Maddock,

Defendants - Appellees.

No. 09-2001

JOYCE E. ROWLEY,

Plaintiff - Appellant,

v.

NORTH MYRTLE BEACH, CITY OF; JOHN SMITHSON, City Manager, Individually and in his representative capacity as employee of the City of North Myrtle Beach; JOEL DAVIS, Assistant City Manager, Individually and in his representative capacity as employee of the City of North Myrtle Beach; KEVIN BLAYTON, Public Works Director, Individually and in his representative capacity as employee of the City of North Myrtle Beach; PLANNING AND DEVELOPMENT DIRECTOR FOR THE CITY

OF NORTH MYRTLE BEACH; CATHY E. MADDOCK, Personal Representative of the Estate of Douglas Maddock, personal representative Douglas Maddock,

Defendants - Appellees.

Appeals from the United States District Court for the District of South Carolina, at Florence. Terry L. Wooten, District Judge. (4:07-cv-01636-TLW; 4:06-cv-01873-TLW)

Submitted: December 2, 2009 Decided: December 16, 2009

Before WILKINSON and MICHAEL, Circuit Judges, and HAMILTON, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

Joyce E. Rowley, Appellant Pro Se. Derwood Lorraine Aydlette, III, Christopher Wofford Johnson, GIGNILLIAT, SAVITZ & BETTIS, Columbia, South Carolina, for Appellees.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

In these consolidated appeals, Joyce Rowley appeals

the district court's orders adopting the magistrate judge's report and recommendation and dismissing her two consolidated cases. We have reviewed the record and the district court's orders and affirm for the reasons cited by the district court. See Rowley v. City of N. Myrtle Beach, Nos. 4:06-cv-01873-TLW-TER; 4:07-cv-01636-TLW-TER (D.S.C. Aug. 21, 2009). We agree with the district court that Rowley's dilatory conduct during the course of the proceedings and willful disregard of the court's orders, specifically her failure to appear for depositions, warranted dismissal and an order that she pay attorneys' fees and costs related to the depositions. We have considered Rowley's arguments concerning other court orders issued during the course of the proceedings and find her arguments to be without merit and that, in most instances, the issues related to those orders had no bearing on the court's decision to dismiss the cases. We dispense with oral argument because the facts and legal contentions are adequately presented in

the materials before the court and argument would not aid the decisional process.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
FLORENCE DIVISION

JOYCE E. ROWLEY, Plaintiff, vs. CITY OF NORTH MYRTLE BEACH, JOHN SMITHSON, City Manager; JOEL DAVIS, Assistant City Manager; KEVIN BLAYTON, Public Works Director, individually and in their representative capacities as employees of the City of North Myrtle Beach; PLANNING AND DEVELOPMENT DIRECTOR for the City of North Myrtle Beach; and CATHY E. MADDOCK as Personal Representative of the Estate of Douglas Maddock, Defendants.	)	Civil Action No.: 4:06-1873-TLW-TER 4:07-1636-TLW-TER

ORDER

Plaintiff Joyce E. Rowley ("plaintiff") filed Civil Action No. 06-cv-1873 on June 26, 2006. Plaintiff also filed Civil Action No. 07-cv-1636 which was removed to Federal Court on June 12, 2007. The plaintiff now resides in Massachusetts.

On March 12, 2009, United States Magistrate Judge Thomas E. Rogers, III, issued an Order requiring the plaintiff to pay attorney's fees and costs to the defendants in the amount of $11,985.44 by April 13, 2009. (Doc. #225, 326). The March 12, 2009 Order also directed plaintiff to

appear[1] for her deposition at defense counsel's office at 10:00 a.m. on April 17, 2009. (Doc. #225, 326). The Order further noted that if the plaintiff fails to pay the fees and costs by April 13, 2009 or fails to appear for her deposition on April 17, 2009, the Magistrate Judge will again recommend that the case be dismissed. (Doc. #225, 326).

On March 30, 2009, the plaintiff filed objections to the provisions of the Magistrate Judge's Order requiring her to pay fees and costs to the defendant. (Doc. #234, 342). On March 31, 2009, the plaintiff filed objections to the provisions of the Magistrate Judge's Order requiring her to attend a deposition or face dismissal. (Doc. #237, 345). The defendants filed a reply to each of the plaintiff's objections. (Doc. #239, 347)(Doc. #240, 348). This Court overruled the plaintiff's objections and affirmed the Magistrate Judge's Order on April 7, 2009. (Doc. #241, 349).

The plaintiff then filed a motion for reconsideration of this Court's October 31, 2008 Order which adopted the Magistrate Judge's August 22, 2008 recommendation that the plaintiff be required to pay the fees and costs associated with her missed depositions and be required to appear for a deposition on a specified date. (Doc. #243, 351). The

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[1]The first number listed reflects the document number in C/A No. 4:07-1636, the lead case. The second number reflects the document number in C/A No. 4:06-1873.

defendants filed a response to the plaintiff's motion to reconsider on April 15, 2009. (Doc. #246, 354). The plaintiff filed a reply to the defendants' response on April 27, 2009. (Doc. #255, 363). On May 6, 2009, this Court entered an Order denying the plaintiff's motion to reconsider this Court's October 31, 2008 Order. (Doc. #259, 367).

On April 15, the defendants filed a motion to dismiss this action based on the plaintiff's noncompliance with the Magistrate Judge's Order directing the plaintiff to pay the fees and costs ordered by this Court or to appear for her deposition. (Doc. #245, 353). The plaintiff filed a response in opposition to this motion on May 8, 2009. (Doc. #261, 369). The defendants filed a reply to this response on the same day. (Doc. #263, 371). This matter is now before the Court for consideration of the Magistrate Judge's Report and Recommendation ("the Report") issued on June 1, 2009. (Doc. #278, 386). In the Report, the Magistrate Judge recommended that the defendants' motion to dismiss be granted and that this action be dismissed with prejudice. (Doc. #278, 386). The plaintiff filed objections to the Report on June 18, 2009. (Doc. #287, 395). The defendants[2]

[2]The Court notes that there appears to have been some confusion with the filing date of the objections in C.A. No. 4:06-1873, and that a duplicate copy of the objections have been docketed at (Doc. #397). The Court notes that the objections are timely, and have been fully considered by this Court.

replied to the plaintiff's objections on June 23, 2009. (Doc. #289, 398). In conducting a review of the Report, the Court applies the following standard:

> The magistrate judge makes only a recommendation to the Court, to which any party may file written objections...The Court is not bound by the recommendation of the magistrate judge but, instead, retains responsibility for the final determination. The Court is required to make a de novo determination of those portions of the report or specified findings or recommendation as to which an objection is made. However, the Court is not required to review, under a de novo or any other standard, the factual or legal conclusions of the magistrate judge as to those portions of the Report and Recommendation to which no objections are addressed. While the level of scrutiny entailed by the Court's review of the Report thus depends on whether or not objections have been filed, in either case, the Court is free, after review, to accept, reject, or modify any of the magistrate judge's findings or recommendations.

Wallace v. Housing Auth. of the City of Columbia, 791 F. Supp. 137, 138 (D.S.C. 1992)(citations omitted).

This Court is well-aware of these consolidated actions, and has conducted a detailed review of numerous documents filed by the parties over the course of this litigation. In a prior Report and Recommendation, the Magistrate Judge detailed the plaintiff's misconduct in this action at length.

(Doc. #190, 291). This misconduct includes the plaintiff's failure to appear for her deposition on three separate occasions, the failure to provide documents to the defendants after defense counsel made arrangements for her to do so at their cost, the filing of improper objections to interrogatories, and the filing of a frivolous appeal in an attempt to circumvent the Orders of this Court. (Doc. #190, 291). As highlighted by the Magistrate Judge, the plaintiff's conduct has greatly prejudiced the defendants in this case. (Doc. #190, 291). The Court further notes that the plaintiff has failed to pay the fees and costs required by Court Order to be paid no later than April 13, 2009, and has failed to attend her deposition as required by Court Order. These consolidated actions cannot properly proceed without the testimony of the plaintiff. Further, the plaintiff's noncompliance with an Order of this Court and those of the Magistrate Judge cannot be excused. The plaintiff has had ample warning of the consequences of this noncompliance. She is solely responsible for her failure to prosecute her own case, and has provided no persuasive reasons for her abject failure to properly prosecute her case.

In light of the standard set forth in Wallace, the Court has reviewed, de novo, the Report and the objections. After careful review of the Report and objections thereto, the

Court ACCEPTS the Report of the Magistrate Judge. (Doc. #278, 386). Therefore, for the reasons articulated by the Magistrate Judge and by this Court herein, these consolidated actions are DISMISSED with prejudice.

All other pending motions are dismissed as MOOT.

IT IS SO ORDERED.

s/Terry L. Wooten
United States District Judge

August 21, 2009
Florence, South Carolina

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
FLORENCE DIVISION

Joyce E. Rowley, Plaintiff, *Pro Se*	)	Case No. 4:07cv1636-TLW-TER 4:06cv1873-TLW-TER
vs.	)	
City of North Myrtle Beach, and John Smithson, City Manager; Joel Davis, (Former) Asst. City Manager; Kevin Blayton, Director Public Works Department; Douglas Maddock, (deceased) Director, Planning & Development) Cathy E. Maddock, Personal Representative of the Estate of Douglas Maddock; Individually and in their representative capacities as employees, Defendants.	)	**MOTION FOR DEFAULT JUDGMENT AGAINST INDIVIDUAL DEFENDANTS UNDER FED. R. CIV. PROC 55(b)(2)**

Plaintiff moves that the Court find Defendants John Smithson, Joel Davis, Kevin Blayton, Douglas Maddock, and Cathy E. Maddock in default under Fed. R. Civ. Proc. 55(b)(2) based on these Defendants' admission that they failed to answer in Case No. 4:06cv1873-TLW-TER (Dkt. #240). Due to the default, Plaintiff seeks judgment against these Defendants for Case No. 4:07cv1636 claims relating to the same set of facts as identified in the defaulted case, to wit: Title VII, 42 U.S.C. §1983, First and Fourteenth

Amendment to the Constitution, and wrongful termination in violation of those policies.

Therefore Plaintiff is entitled to compensatory damages, punitive damages, and for costs and fees associated with these Court cases, and is also entitled to compensation from Defendant Smithson by way of his implementing an affirmative action plan as enumerated in her Complaint.

Respectfully submitted,

_____

Joyce E. Rowley, Pro se
P.O. Box 2302
Providence, RI 02906
Phone: 860-405-5851

Dated: June 20, 2008

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
FLORENCE DIVISION

JOYCE E. ROWLEY, Plaintiff, vs. CITY OF NORTH MYRTLE BEACH, JOHN SMITHSON, City Manager; JOEL DAVIS, Assistant City Manager; KEVIN BLAYTON, Public Works Director, individually and in their representative capacities as employees of the City of North Myrtle Beach; PLANNING AND DEVELOPMENT DIRECTOR for the City of North Myrtle Beach; and CATHY E. MADDOCK as Personal Representative of the Estate of Douglas Maddock, Defendants.	)Civil Action No.:)4:06-1873-TLW-TER)4:07-1636-TLW-TER **ORDER**

Presently before the Court is Plaintiff's Motion to Stay (Document # 144)[1]1. On May 30, 2008, the undersigned issued an Order (Document # 131) on numerous pending motions, including Plaintiff's Motion to Quash her deposition as noticed by Defendants and Defendants' Motion to Compel Plaintiff to attend her deposition. The undersigned denied Plaintiff's Motion, granted Defendant's Motion and required that Plaintiff be deposed within thirty (30) days of the date of the Order.

On June 9, 2008, Plaintiff filed Objections (Document

[1]1All document numbers refer to the documents in 4:07-1636-TLW-TER, the lead case.

143) to the May 30th Order, in which she objected to, among other things, the undersigned's ruling regarding her deposition. She also filed the present Motion to Stay (Document # 144), requesting that the requirements regarding her deposition be stayed pending review and final determination of her Objections.

On June 25, 2008, the District Judge entered an Order addressing Plaintiff's Objections. The District Judge stated, "[a]fter careful review of the record in this case, the May 30, 2008 Order of the Magistrate Judge, plaintiff's objections to said Order and defendant's response thereto, as well as the applicable law, this Court cannot conclude that any part of the Order objected to is clearly erroneous or is contrary to law."

Plaintiff's Motion to Stay (Document # 144) is DENIED. However, the deadline to depose Plaintiff will be extended until twenty (20) days from the date of this Order. Defendants shall provide Plaintiff with at least ten (10) days notice of her scheduled deposition.

IT IS SO ORDERED.

s/Thomas E. Rogers, III
Thomas E. Rogers, III
United States Magistrate Judge

June 25, 2008
Florence, South Carolina

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
FLORENCE DIVISION

JOYCE E. ROWLEY, Plaintiff, vs.	)Civil Action No.:)4:06-1873-TLW-TER)4:07-1636-TLW-TER
CITY OF NORTH MYRTLE BEACH, JOHN SMITHSON, City Manager; JOEL DAVIS, Assistant City Manager; KEVIN BLAYTON, Public Works Director, individually and in their representative capacities as employees of the City of North Myrtle Beach; PLANNING AND DEVELOPMENT DIRECTOR for the City of North Myrtle Beach; and CATHY E. MADDOCK as Personal Representative of the Estate of Douglas Maddock, Defendants.	)REPORT AND)RECOMMEND-) ATION

I. INTRODUCTION

Presently before the Court is Defendants John Smithson, Joel Davis, Kevin Blayton, and Cathy Maddock's (collectively, "individual Defendants) Motion to File Answer Out of Time, or, in the Alternative, for Partial Dismissal (Document # 240 in C/A No. 4:06-1873-TLW-TER)[1], Plaintiff's Motion for Default Judgment (Document # 254, 151), Plaintiff's Motion for Declaratory Judgment

[1]Although this case is consolidated with 4:1 07-1636-TLW-TER, the Motion to File Answer Out of Time, or, in the Alternative, for Partial Dismissal, was filed only in the first case, presumably because it pertains only to the Complaint in the first case.

(Document # 274, 169)[2] and Plaintiff's Motion for Default Judgment (Document # 289, 188).[3] All pretrial proceedings have been referred to the undersigned pursuant to 28 U.S.C. § 636(b)(1)(A) and (B) and Local Rule 73.02(B)(2)(e), DSC.

II. PROCEDURAL HISTORY

This case has a very complicated and protracted procedural history. The history relevant to these motions is set forth below. Plaintiff filed this employment action alleging violations of Title VII of the Civil Rights Act of 1964, as amended, and the South Carolina Freedom of Information Act on June 26, 2006. On October 27, 2006, Defendant City filed an Answer (Document # 23) and the individual Defendants filed a Motion to Dismiss (Document # 24), arguing that neither Title VII nor the state Freedom of Information Act provides for any cause of action against individual employees. Thereafter, Plaintiff filed a Motion to Amend her Complaint (Document # 28) to add a state law cause of action for wrongful termination. During a telephonic status conference held on April 17, 2007, counsel for Defendants withdrew the Motion to Dismiss (Document # 24) on behalf of the individual Defendants in light of Plaintiff's Motion to Amend.

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[2]2The first number listed is the number in 4:06-1873-TLW-TER; the second is the number in 4:07-1636-TLW-TER.

[3]3Other motions are pending and will be addressed by separate Order.

Plaintiff also filed a separate lawsuit in state court asserting claims for wrongful termination, fraud, deceit, and misrepresentation. Defendants removed the state court action to this Court, C/A No. 07-1636-TLW-TER. Defendants filed a Motion to Consolidate (Document # 107, 6) the two cases. The undersigned entered an Order (Document # 126, 28) granting the Motion to Consolidate and finding as moot Plaintiff's Motion to Amend her Complaint since the consolidated cases included a cause of action for wrongful termination, which is what Plaintiff sought to allege through the amended Complaint.

Plaintiff filed another Motion to Amend her Complaint (Document # 179, 78) on January 11, 2008. The undersigned entered an Order (Document # 233, 131) granting Plaintiff's Motion and the Amended Complaint (Document # 242, 138) was filed on May 30, 2008. According to the individual Defendants, when they began preparing their Answer to the Amended Complaint, counsel realized that no Answer had been filed after the individual Defendants withdrew their Motion to Dismiss. Thus, they filed their Motion to File Answer Out of Time, or, in the Alternative, for Partial Dismissal.

Defendants also timely filed an Answer to the

Amended Complaint. Plaintiff subsequently filed a Motion for Default Judgment.

III. DISCUSSION

A. Motion to File Answer Out of Time, or, in the Alternative, for Partial Dismissal

The individual Defendants note in their memorandum that, although they believe their Answer to the Amended Complaint fully responds to the allegations currently pending in the consolidated cases, they seek to file an Answer to the original Complaint out of an abundance of caution. The individual Defendants' Motion is not necessary. The original Complaint is no longer controlling and the individual Defendants need not file an Answer to it in light of the fact that an Amended Complaint is in place and Defendants timely filed an Answer to the Amended Complaint. As stated by one court, "[t]he original complaint was, in a sense, amended out of existence." Thomas v. Southeastern Pennsylvania Transp. Authority, 1989 WL 11222, *1 (E.D.Pa.,1989); see also LeBrew v. Reich, 2006 WL 1662595, *4 (E.D.N.Y.,2006) ("Pursuant to Rule 15(a), a defendant's time to answer is renewed upon the filing of each successive amended complaint."). Therefore, the Motion to File Answer Out of Time is moot.[4]

[4]Assuming *arguendo*, it was necessary to file an Answer to the original Complaint, the individual Defendants have shown the

The Court need not address the alternative Motion for Partial Dismissal.[5]

B. Plaintiff's Motions for Default Judgment

Plaintiff's first Motion for Default Judgment (Document # 254, 151) fails for the same reasons the Motion to File Answer Out of Time is moot. Plaintiff filed her Motion for Default Judgment after the individual Defendants filed their Motion and after Defendants filed an Answer to the Amended Complaint. Thus, although the individual Defendants were technically in default when they failed to

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requisite excusable neglect under Rule 6(b)(1)(B), Fed.R.Civ.P. for allowing the filing of an Answer out of time. The factors to be considered include "the danger of prejudice to the [non-moving party], the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith." Pioneer Investment Svcs Co. v. Brunswick Associated Ltd. P'ship, 507 U.S. 380, 395 (1993). Plaintiff would certainly not be prejudiced by allowing the individual Defendants to answer because the original Complaint is no longer in effect and the Amended Complaint has been answered. Although there was an extremely long delay in the individual Defendants' realization that no Answer had been filed, the delay has no impact on the judicial proceedings because a new Complaint has been filed and is controlling. (*Emphasis added).* Further, the reason for the delay is clearly simple inadvertence and there is no evidence of bad faith. All Defendants have actively litigated this case and there is no indication that they purposefully failed to answer the original Complaint.

[5]The undersigned notes, however, that it is well established Title VII does not provide for individual liability. Lissau v. Southern Food Svc., Inc., 159 F.3d 177 (4th Cir. 1998).

file an Answer to the original Complaint, their default was essentially cured by the filing of an Amended Complaint and their timely Answer to the Amended Complaint.[6] Accordingly, it is recommended that Plaintiff's first Motion for Default Judgment be denied.

* * *

IV. CONCLUSION

For the reasons discussed above, it is recommended that the individual Defendants' Motion to File Answer Out of Time, or, in the Alternative, for Partial Dismissal (Document # 240 in C/A No. 4:06-1873-TLW-TER) be deemed moot, Plaintiff's Motion for Default Judgment (Document # 254,151) be denied, Plaintiff's Motion for Declaratory Judgment (Document # 274, 169) be denied and Plaintiff's Motion for Default Judgment (Document # 289, 188) be denied.

s/Thomas E. Rogers, III
Thomas E. Rogers, III
United States Magistrate Judge

February 23, 2009
Florence, South Carolina

[6]Furthermore, technical default does itself warrant default judgment. See Nishimatsu Const. Co., Ltd. v. Houston Nat. Bank, 515 F.2d 1200, 1206 (5th Cir. 1975). A defendant in default "is not held to admit facts that are not well-pleaded or to admit conclusions of law." Id. In the present case, default judgment would not be appropriate on the claims pleaded against the individual Defendants in the original Complaint. See footnote 4.

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
FLORENCE DIVISION

Joyce E. Rowley,	)	Case No.
	)	4:07cv1636-TLW-TER
Plaintiff, *Pro Se*	)	4:06cv1873-TLW-TER
vs.	)	
City of North Myrtle Beach, and	)	**PLAINTIFF'S**
John Smithson, City Manager;	)	**OBJECTIONS TO**
Assistant City Manager;*	)	**SECOND REPORT**
Kevin Blayton, Director, Public	)	**&**
Works; Douglas Maddock,	)	**RECOMMENDATIONS**
(deceased)* Director,	)	
Planning & Development*	)	
Cathy E. Maddock, Personal	)	
Representative of the Estate	)	
of Douglas Maddock;	)	
Joel Davis*,Individually and in	)	
their representative	)	
capacities as employees of the	)	
City of North Myrtle Beach	)	
Defendants.	)	

Plaintiff herein files objections to the Second Report and Recommendations titled "Report and Recommendations and Order" issued on February 23, 2009, and mailed with a Notice on February 24, 2009. Plaintiff incorporates by reference all objections filed previously to the First Report and Recommendations. Objections to the Order contained within the Second Report and Recommendations are also included here.

INTRODUCTION

A Report and Recommendations was issued on August 22, 2008 which decided several of Defendants' motions to dismiss, but not Plaintiff's motions for default judgment and declaratory judgment[1]. Plaintiff filed objections timely September 11, 2008. District Judge Terry Wooten ruled on the Report and Recommendations on October 31, 2008, granting the Report's Alternative Recommendation (Dkt. 206,307[2]). The Order allowed that the Schedule would be amended. A Third Amended Schedule was ordered on February 23, 2009.

I. Recommendation to Deny Plaintiff's Motion for Default Judgment (Dkt. 151,254)

Plaintiff objects to the Report's recommendation to deny Plaintiff's Motion for Default Judgment for the reasons enumerated below. Although the Report acknowledged that the Individual Defendants were in default, the Report states that default was cured by their having timely filed an answer

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*Automatic substitution for representative capacity as employees status is required.

[1]Some of Plaintiff's other motions are subject to the Order made part of this Report. Still other of Plaintiff's motions remain outstanding. These include a Motion to Disqualify Counsel pending since September 2007, a Motion to Compel production under a Subpoena Duces Tecum issued in March 2008, and a Motion to Compel court-ordered production pending since June 2008.

[2]Docket numbers cited are for Case No. 4:07cv1636-TLW-TER first, 4:06cv1873-TLW-TER next.

to the Amended Complaint (Cplt., Dkt. 138, Ans. Dkt. 141, 4:07cv1636). The Report then states in Footnote 6 that default judgment would not be appropriate on the claims pleaded against the Individual Defendants in the original Complaint and for reasons cited in Footnote 4.

1. Failure to Serve.

Plaintiff objects that the Report's finding fails as the Answer to the Amended Complaint was not served on Plaintiff. On August 4, 2008, Plaintiff notified Defendants of this failure to serve, but did not receive any response (Ex. 1). Around the same time, Defendants had failed to serve on Plaintiff a Motion for Sanctions and two other pleadings (Dkt. 175-177). Further, the Motion to Amend referred to by the Report only amended the complaint in 4:07cv1636 as clearly stated in the motion and as captioned (Dkt. 78, 179 as corrected for other reasons on Dkt. 86, 187). Therefore, Individual Defendants have not cured the failure to answer the original Complaint as amended.

2. Meritorious Claims.

Plaintiff objects that the Report's second finding that the default judgment is inappropriate to the claims in the original Complaint also fails. By filing a Motion to File out of Time in only the first case, and then only answering the original Complaint, Individual Defendants sought to avoid

liability. In this way, they attempted to establish that there were no meritorious claims against them, and so default judgment should fail. The Report concurs in FN 5, citing *Lissau v. Southern Food Svc., Inc.* as disallowing individual liability regarding the need for the Motion for Partial Dismissal as well. Plaintiff objects to this finding on the basis that *Lissau* itself allows that there may be cases of individual liability as does the plain language of Title VII. Further, Plaintiff objects because the amendment to the original complaint included 42 U.S.C. §1983 claims which the Report omitted from its procedural history and its reasoning[3].

The original Complaint was amended as of right on December 4, 2006 based on Fed. R. Civ. Proc. 15(a), which states: "A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served..."

It is long-held that a motion to dismiss is not a responsive pleading *(Thomas v. Southeastern Pennsylvania Transp. Authority*, and *Domino Sugar Corp. v. Sugar Workers Local Union 392 of United Food and Commercial Workers Intern. Union* 10 F.3d 1064 C.A.4.Md.(1993),

[3]The Report erroneously asserts that the reason for the amendment to the original claim was to add wrongful termination claims (Report, p. 2).

"Motion to dismiss is not responsive pleading which precludes party from amending pleading without leave of court. Fed. Rules Civ. Proc. Rules 12(b)(6), 15(a)). Also in the Fourth Circuit:

"FN2: Rule 15(a) gives plaintiff the freedom to amend his complaint once as a matter of course before the filing of a "responsive pleading." The motion to dismiss was not a responsive pleading for the purpose of Rule 15(a), and thus plaintiff could still amend without leave of the court after the motion to dismiss had been made. 3 Moore, Federal Practice (2d ed.) ¶ 15.07[2] at 851-52; 6 Wright, Federal Practice and Procedure §§ 1475, 1483."

Smith, V. Blackledge, 4th Circuit, 451 F.2d 1201 (1971)

Therefore, the amendment to the complaint filed December 4, 2006 did not need approval from the Court. Individual Defendants[4] should have answered within ten days after service of the amendment on December 4, 2006, or December 17, 2006 since service was by mail. According to Wright & Miller, citing *Williams v. Board of Regents*, even where one defendant has answered, the amendment will apply to other defendants (6 Wright & Miller §1481, *Williams,* 477 F .3d 1282, 11th Cir. (2007)). Further, Courts have held that when a pro se plaintiff filed during the time when amendment was allowed, the complaint was treated as amended (*Jackson v. Strayer College*, 941 F.SUPP. 192,

[4]Defendant City responded that it "did not object" to the amendment to the original complaint on December 6, 2006.

D.C.D.C. (1996)).

In fact, the December 4, 2006 Amendment to the Complaint is in effect, *and* the January 11, 2008 Amendment to Complaint in 4:07cv1636 accepted by the Court on May 30, 2008 is also in effect but neither were answered by Individual Defendants.

3. Improper Argument.

Plaintiff objects that the Report's review and findings noted in Footnote 4 are not a legal argument against default judgment under Rule 55, but an argument in support of the Individual Defendants' motion to file answer out of time under Rule 6(b), which is then applied arbitrarily.

The Report uses four criteria to find that Individual Defendants have shown the "requisite excusable neglect" to allowing the filing of an Answer out of time. The appropriate criteria list for default judgment is much more extensive, and the Court did not perform such a review.

The Report's review as applied was arbitrary. The findings relied on the amendment to the second complaint to show that Plaintiff was not prejudiced since the "original Complaint is no longer in effect and the Amended Complaint has been answered," and that the delay, in excess of 500 days, had no impact on the judicial proceedings because a "new Complaint has been filed and is controlling." It is

unclear how the Court came to this decision that a failure to file for nearly two years and until discovery was closed did not prejudice Plaintiff, especially in light of the Defendants' failure to file pretrial disclosures on March 18, 2008 before the "new Complaint" was filed.

The Report's third and fourth findings on this matter summarily state that "all Defendants have actively litigated this case and there is no indication that they purposefully failed to answer the original Complaint." The Court provides no evidence from the record on which to base this claim, and in fact, the record contradicts this statement. The original Partial Dismissal indicates that Individual Defendants purposefully failed to answer.

Nor did they litigate actively. Individual defendants did not attend Court motion hearings or the depositions that Plaintiff held. One Individual Defendant has left employment with the City of North Myrtle Beach without notifying the Court or Plaintiff, although it may affect his ability to pay damages. Another Individual Defendant is deceased. His personal representative, a Court Reporter and officer of the Court, did nothing until she was appointed nearly a year later and then refused to provide documents under a subpoena duces tecum. As noted previously, all Individual Defendants sought to escape liability through

filing an answer only to the original Complaint, and only in that docket.

4. Abuse of Discretion.

Plaintiff objects because the Court provided reasons for the excusable neglect, the lack of prejudice, and the showing of good faith beyond what the Individual Defendants or the record shows.

The Court summarily dismissed the Plaintiff's evidence of bad faith and prejudice stating "the original Complaint is no longer in effect" and the "Amended Complaint has been timely answered." This finding is based on the Order consolidating the cases "for all purposes." However, the Defendants defied the consolidation Order by filing the Motion to File out of Time only in the original case docket. Also, Defendants clearly state that "The individual defendants' alternative request for dismissal...has nothing to do with the claims in Plaintiff's complaint in 07-1636 or in the amended complaint."(Dkt. 161, 265 *Reply in Support of Motion to File out of Time or for Partial Dismissal*). Even Defendants acknowledge that Plaintiff has a separate complaint in 07-1636 and the amended complaint, and that their motion does not apply to it. By so arguing for them in this matter, the Court allows them to hold dual opposing positions–that the answer to the amendment in the second

case cured the failure to answer in the first, but the partial motion to dismiss only affected the first complaint–but not as amended because of the consolidation order for "all purposes."

5. Failure to review to more stringent standard; Failure by Court to Enter Default.

Plaintiff objects that the Court Clerk did not enter the default under 55(a) and that the Report findings did not review the default at a more stringent standard under Rule 60(b).

Plaintiff requested the Clerk of the Court to make default entry upon showing of other suitable proof on June 20, 2008, to which the Clerk has refused without reason (Ex. 2). Defendants should have been required to file a Rule 60(b) motion to vacate the entry of default. Therefore, the Court should have reviewed the default in light of the entire record. If so, the Court would have found inexcusable neglect as in *Taylor v. City of Ballwin, Missouri* (859 F .2d 1330, 8th Circuit (1988): failing to answer any amended complaints, failing to submit pre-trial submissions in accordance with a pre-trial order, and precluding plaintiff from conducting discovery.

6. Objection to Order: "Motion to File Out of Time."

Plaintiff also objects to the Report's finding that Defendants' "Motion to File Answer out of Time or in the Alternative to Dismiss" be deemed moot.

The issue of the Defendants' failure to answer a complaint for nearly two years was not cured, either by answering a second complaint or by excusable neglect. For the reasons stated above, Plaintiff objects that Defendant's motion should be denied, not deemed moot, and Plaintiff should be granted Default Judgment against Individual Defendants.

* * *

CONCLUSION

Under 28 U.S.C. §636, the District Judge may accept, reject, or adopt in part or in whole the Report and Recommendations. For the reasons set forth above, Plaintiff seeks the rejection of the First and Second Report and Recommendations; that the District Judge grant Plaintiff's Cross-Claim Motion for Default Judgment against all Defendants (Dkt. 188), or in the alternative that Plaintiff's Motion for Default Judgment against Individual Defendants (Dkt. 151) be granted.

Respectfully submitted,
Joyce E. Rowley, Pro Se Plaintiff
PO Box 2302
Providence, RI 02906

Signed this 10th day of March, 2009.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
FLORENCE DIVISION

JOYCE E. ROWLEY,	)Civil Action No.:
Plaintiff,	)4:06-1873-TLW-TER
vs.	)4:07-1636-TLW-TER
CITY OF NORTH MYRTLE BEACH, JOHN SMITHSON, City Manager; JOEL DAVIS, Assistant City Manager; KEVIN BLAYTON, Public Works Director, individually and in their representative capacities as employees of the City of North Myrtle Beach; PLANNING AND DEVELOPMENT DIRECTOR for the City of North Myrtle Beach; and CATHY E. MADDOCK as Personal Representative of the Estate of Douglas Maddock,	)
Defendants.	)

ORDER

Plaintiff Joyce E. Rowley ("plaintiff") filed Civil Action No. 06-cv-1873 on June 26, 2006. Plaintiff also filed Civil Action No. 07-cv-1636 which was removed to Federal Court on June 12, 2007.

This matter now comes before this Court for review of the Report and Recommendation ("the Report") filed by United States Magistrate Judge Thomas E. Rogers, III, to whom this case had previously been assigned. (Doc. #218, 319)[1]. In the Report, the Magistrate Judge recommends that

[1]The first number listed reflects the document number in C/A No. 4:07-1636, the lead case. The second number reflects the document number in C/A No. 4:06-1873.

the individual defendants' motion to file answer out of time, or in the alternative, for partial dismissal (Doc. #240 in C/A No. 4:06-1873)[2] be deemed moot, that the plaintiff's motion for default judgment (Doc. #151, 254) be denied, that the plaintiff's motion for declaratory judgment (Doc. #169, 274) be denied, and that the plaintiff's motion for default judgment (Doc. #188, 289) be denied. The plaintiff filed objections to the report. (Doc. #223, 324). In conducting this review, the Court applies the following standard:

> The magistrate judge makes only a recommendation to the Court, to which any party may file written objections...The Court is not bound by the recommendation of the magistrate judge but, instead, retains responsibility for the final determination. The Court is required to make a de novo determination of those portions of the report or specified findings or recommendation as to which an objection is made. However, the Court is not required to review, under a de novo or any other standard, the factual or legal conclusions of the magistrate judge as to those portions of the Report and Recommendation to which no objections are addressed. While the level of scrutiny entailed by the Court's review

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[2]Although this case is consolidated with C/A No. 4:07-1636, this motion was filed only in C/A No. 4:06- 1873.

> of the Report thus depends on whether or not objections have been filed, in either case, the Court is free, after review, to accept, reject, or modify any of the magistrate judge's findings or recommendations.

Wallace v. Housing Auth. of the City of Columbia, 791 F. Supp. 137, 138 (D.S.C. 1992) (citations omitted).

In light of the standard set forth in Wallace, the Court has reviewed, de novo, the Report and the objections. After careful review of the Report and objections thereto, the Court ACCEPTS the Report. (Doc. #218, 319).

IT IS SO ORDERED.

s/Terry L. Wooten
United States District Judge

March 16, 2009
Florence, South Carolina

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
FLORENCE DIVISION

Joyce E. Rowley, Plaintiff, *Pro Se* vs. City of North Myrtle Beach, John Smithson, City Manager, Kevin Blayton, Director, Public Works , Individually and in their representative capacities as employees of the City of North Myrtle Beach; Assistant City Manager and Planning & Development Director; Cathy E. Maddock, Personal Representative of the Estateof Douglas Maddock; and Joel Davis, Defendants.	)	Case No. 4:07cv1636-TLW-TER 4:06cv1873-TLW-TER **MOTION FOR DEFAULT JUDGMENT FAILURE TO ANSWER COMPLAINT [DKT 138]**

Pursuant to Fed. R. Civ. Proc. 55(b), Plaintiff moves the Court for default judgment against Defendants for failure to serve an Answer to her Amended Complaint [dkt 138, 239][1] as required by Fed. R. Civ. Proc. 5(a). Plaintiff offers the attached memorandum in support of her motion.

Respectfully submitted
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PO Box 30343
Acushnet, MA 02743
860-405-5851

Dated this 30th day of April, 2009.

[1]The first docket number is for CN 4:07cv1636-TLW-TER, the second for CN 4:06cv1873-TLW-TER.

MEMORANDUM IN SUPPORT OF DEFAULT JUDGMENT

I. PROCEDURAL HISTORY

Plaintiff filed a Motion to Amend and Amendment to Complaint in Case No. 04:07-cv-1636 on January 11, 2008, served on Defendants on January 7, 2008 [dkt. 78, 179]. At the May 8, 2008 Motion Hearing, the Court granted the Motion to Amend [dkt 131, 233]. The Amended Complaint was filed May 30, 2008 by the Court [dkt 138, 242]. In June 2008, Defendants filed an Answer with the Court but failed to serve it on Plaintiff.

In mid-July 2008, Plaintiff noticed Defendants that she had not been served a Motion for Sanctions but that the motion had been filed with the Court. In response, Defendants filed three amended services, and served her the motions [dkt. 175 for dkt. 145, Opposition to Ptfs. Objections; dkt. 176 for dkt. 146, Opposition to Ptfs. Motion to Stay, and dkt. 177 for dkt. 155, Motion for Sanctions][2]. Defendants' Counsel noted they were "transitioning in...secretarial staff" and requested notification of any other failures (Exh.1, Letter dated July 22, 2008).

Plaintiff notified Defendants' Counsel by email on August 4, 2008 that she had not received their Answer to the

[2]The amended certifications of service were not filed in C/N 4:06cv1873

Amended Complaint (Exh. 2, Email). She did not receive a response, nor did she receive notification that the email had failed to transmit or been blocked by spamblocker [dkt. 223-1, Affidavit]. She noticed Defendants again of their failure in her response to the Second Report & Recommendations (Exh. 3, Certificate of Service, and proof of delivery of Objections to Second Report and Recommendation, March 10, 2009). To date, Defendants have not cured the defect.

Previously, Plaintiff sought default judgment for Individual Defendants' failure to Answer the original Complaint in Case No. 4:06-cv-1873 [dkt. 151, 254], and for failing to provide pre-trial disclosures and providing a false declaration regarding her deposition [dkt. 188, 289]. Most recently, Plaintiff has sought a third default judgment in her Motion for Reconsideration, which is currently pending before the Court [dkt. 243, 344] . This current motion is filed due to the failure of all Defendants to serve an Answer to the Amended Complaint on Plaintiff in Case No. 4:07-cv-1636.

II. ARGUMENT

Fed. R. Civ. Proc. 5(a) states that every pleading, motion, or other document shall be served upon every other party. An unserved pleading lacks any legal force and effect until service is accomplished. Default judgment is proper

where the Defendants have failed to defend allegations in the amended Complaint. If, as the Court has ruled in adopting its Second Report and Recommendations, the Amended Complaint remains the controlling document, then none of the Defendants have answered and default judgment is appropriate[3].

1. Standard of Review

Review of requests for default judgment is discretionary upon the Court. Among other things, the Court reviews whether the default is technical, whether plaintiff is prejudiced by the delay, whether there are clear grounds for default, whether it was a good faith mistake and whether there was excusable neglect in the failure (Wright Miller & Kane, Federal Practice and Procedure: Civil 3d §2685, p 32-40). The Court may also review the default with an eye towards a future request to set aside the judgement under Fed R. Civ. Proc.60(b). If so, the Court reviews whether there is a meritorious defense. However, by their default, Defendants admit every "well-pled allegation" of the Complaint (Id. §2688, p. 62, *Trans World Airlines, Inc. v. Hughes*, D.C.N.Y., 308 F. supp. 679, 683, 2nd Cir.(1969)) or "facts well-pleaded" (*Thomson v. Wooster*, 5 S.Ct. 788,

[3]While Plaintiff respectfully disagrees with the Court's decision, whether or not the first Complaint is still in effect, clearly now all defendants are in default in the second case.

(1885)). After a default is established, the Plaintiff's facts are accepted without contest.

A. Default Clear and Not Technical; Prejudice to Plaintiff

Grounds for default are clear as Defendants did not serve Plaintiff an Answer in June 2008. And while they might argue that initially it was a good faith mistake in transitioning new staff, they had a duty to review all of their files to determine what was not served. Plaintiff argues that although the default may appear to be technical, this is the second time that Defendants have failed to properly answer her complaints. Her first complaint was not answered at all by Individual Defendants for a year and a half. Defendants claimed they realized that failure while preparing this Answer [dkt. 240-2, p.2].

Still, despite receiving notice that Plaintiff had not been served several of their filings, they failed to check this filing. Then, even when noticed in August 2008, they still failed to serve Plaintiff. And again in March 2009, they continued to ignore the defect. Yet Defendants argued that this Answer cured the first failure, which the court relied on in making its Second Report and Recommendation. Further, to respond now would be outside of the twenty-day response period.

And, as seen from the discussion below, five new

defenses were added in the June 2008 Answer beyond what had been provided in Answer to the original Complaint [dkt. 23, 06-1873], and the State claim filed in Horry County [dkt. 1, 2007 CP 26-1175, attached as Exh. 4]. Yet these defenses came six months after the close of discovery, a year after Defendant Maddock passed away, and two months after Defendant Davis left employment with Defendant City. Plaintiff was denied the ability to discover the basis for these new defenses, and so the default is more than a technical one. Clearly, Plaintiff has been prejudiced by not having received it from Defendants to date.

B. Facts Well-Pleaded

From the very first filing in June 2006 and in each pleading thereafter[4], Plaintiff has provided detailed, factual recounting of the events leading to her termination and the actions taken by Defendants afterwards. As noted in the Motion to Amend, the facts in the last Amendment are identical to the facts in the previous pleadings [dkt. 86, 187]. Names of participants, dates of conversations and specific phrases used, and documents and witnesses involved in each event were identified in each pleading.

The factual pleadings included:

[4]These include original Complaint at dkt. 1 (06-1873), First Amendment at dkt. 28 (06-1873), Removed State claims at dkt. 12 (07-1636), and the subject Amendment at dkt. 138 (07-1636).

- Identification of documents and witnesses to Defendants passing over a qualified female candidate in hiring a site planner, that Plaintiff had written a memo regarding the same, that Plaintiff reported the unlawful hiring practice to Defendants, and that Defendants position changed after she reported the discrimination to a retaliatory one;
- Identification of the documents that repudiated Defendants' pretextual reason for terminating her and witnesses present that could substantiate those facts;[5]
- Identification of documents that showed Plaintiff's performance was satisfactory at the time of her termination; and
- Documentation of the "resignation-in-lieu-of-termination" discriminatory disciplinary and firing practices of Defendants.

State claims were equally well-pled. Plaintiff identified dates and documents regarding the federal, state and local policies violated by Defendants in her termination,

[5]Plaintiff's depositions of Assistant Planning Director Paul Blust, and Personnel Officer Verlinda Jones, also yielded admissions and substantiation to these facts, as well as documents disclosed during discovery to Defendants as early as April 27, 2007. Plaintiff also provided a listing of documents and witnesses during Pre-trial disclosures that substantiated these facts on March 18, 2008 and again on August 18, 2008.

and the fraudulent means by which Defendants conducted the termination. FOIA violations were also documented.

C. No Meritorious Defenses.

Plaintiff's first position is that if the Court only recognizes the Amended Complaint, Defendants are without any valid defenses as they failed to serve Plaintiff an Answer. Even were Defendants to serve an Answer now, the twenty-day response time has long-since lapsed.

Were the Court to review prior defenses offered or recognize the Amended Complaint of December 2006, only five defenses were provided in the first Answer by Defendant City in December 2006 and six in the State claim Answer in March 2007. Each had as a final defense responses to factual pleadings and allegations. The June 2008 Answer added five more defenses to these original defenses. Coming as it did without service, six months after the close of discovery, after the death of one defendant and the resignation-in-lieu-of-termination of another, to include those defenses presented in the unserved Answer would be highly prejudicial to Plaintiff.

To the extent that it may be necessary, Plaintiff offers the following argument against the defenses that were listed in the first two Answers.

1. Failure to state a claim upon which relief may be

granted.

Defendants argued variously that the Title VII claims were prohibited against Individual Defendants, as was FOIA. No other claims were cited in that original Motion to Dismiss or the Partial Motion to Dismiss filed with the untimely Answer in June 2008 [dkt. 240]. The first motion was withdrawn, the second was deemed moot. Plaintiff has stated that the plain language of Title VII allows compensatory damages to be charged against supervisors who violate Title VII, municipal supervisors are not expressly excluded, and only against supervisors of fewer than 18 employees are exempted. None of that applies here, and so this defense is without merit.

2. Time-barred Claims.

Defendants misled Rowley regarding purported complaints about her performance and hid documents during and after her employment that would have led her to file suit sooner. In fact, Rowley filed a state claim of FOIA because of the numerous documents that were hidden from her during her employment but released after she was terminated.

Therefore, Rowley is entitled to the equitable tolling of the limitations in both cases (*Kokotis v. United States Postal Serv.*, 223 F .3d 275, 280, 4th Cir., 2000). For this

reason, none of Rowley's claims are time-barred and this defense fails.

3. Mitigation of Damages.

Defendants have not submitted any documentation to Plaintiff that would substantiate this claim. Instead, Plaintiff provided a listing of over 110 positions she applied for, 89 in her field as a planner, to which she applied, and her annual tax documents substantiating that work she found was not comparable to her previous responsibilities, duties or compensation.

4. Purported Legitimate Non-Discriminatory Reason for Termination (06-1873, dkt. 23).

In Defendant City's Answer of December 2006, it claimed as a Fourth Defense that there was a "legitimate, non-discriminatory" reason for Plaintiff's termination under the McDonnell-Douglas mixed-motive schema.[6] Throughout the litigation, Defendants have failed to provide any evidence of a non-discriminatory motive.

In response to Plaintiff's First Request for Document Production served on Defendants in November 2007, they responded as follows:

> **2. All documents and things relating to the allegedly legitimate non-discriminatory reason for terminating Plaintiff.**

[6]This was not raised as a defense in the State claim.

Response: Plaintiff's notice of termination dated February 23, 2005, sets forth the City's reasons for termination of Plaintiff's employment and a copy of that document has already been produced to Plaintiff along with her personnel file.

(Exh. 5-7, RDP #2, Smithson, Davis, and Blayton, December 31, 2007)

The referenced document is the pretextual termination memo cited in her Amended Complaint, [dkt. 138, 239, p.9-11, #41 - 47] under the previous section. She had found only one write-up addressed to her subordinate in her personnel file as of September 2004 when she viewed it [dkt.138, 239 p. 11, #46 and dkt.28, p.3, #7]. Therefore, this defense is legally insufficient.

5. Defendants Plead Immunity under the S.C. Tort Claims Act (2007-CP-26-1175).

Defendants plead that the provisions of the South Carolina Tort Claims Act §15-78-10 provide immunity for their actions. However, under §15-78-60, if asserting an affirmative immunity as a defense, Defendants are required to show evidence to meet the burden of proof that they acted within public policy ("Burden of establishing a limitation upon liability or an exception to the waiver of immunity under the Tort Claims Act is upon the governmental entity asserting as an affirmative defense." *Arthurs v. Aiken County*, S.C.App. (1999), 338 S.C. 253,225 S.E. 2d 542).

Defendants have failed to provide any such proof that their actions were in keeping with public policies. Instead, Defendants' practices and actions regarding the hiring, firing, and disciplinary actions were clearly outside of public policies. Their actions during discovery indicate that they have attempted to hide the extent of those violations.

In particular, despite numerous Motions to Compel and two Court Orders, Defendants have withheld:

1. Transcripts of the February 21, 2005 City Council meeting requested by EEOC and Plaintiff which would prove the reason for termination was pretextual;

2. Documents generated during the creation of the February 2005 Personnel Manual including City Council minutes adopting it, the name of all counsel who helped prepare it, and management's recommendations which would prove that Plaintiff was required to sign a waiver;

3. Personnel files of the four women in the Planning Department who were similarly discriminated against by Defendant Maddock (Dkt. 99, RDP #8);

4. Plaintiff's male replacements' evaluation and pay raise in 2006-2007 and Defendant Maddock's comments on Rowley's male comparitors' evaluations which were "omitted" from the copies provided under the Second Motion to Compel which would prove gender discrimination

by disparate treatment;

5. Complaints against male employees in the Planning Department which would prove gender discrimination by disparate treatment; and

6. Defendant Maddock's notes on the hiring of the site planner during 2003-2004 which would prove the retaliatory cause.

Therefore, this defense is without merit.

6. Response to Pleadings, Denials [7].

Defendants deny all pleadings in both cases without providing any set of facts to the contrary. Denials, on their own, are not enough to withstand summary judgment (*Bergeron v. Dorrs*, 287 F. Supp 52, D.C. Conn., 1968). Defendants have not offered even a scintilla of evidence other than denial–neither documents nor testimony from witnesses. In fact, Defendants claim not to have taken any statements from witnesses, and have not produced a single document regarding her termination during discovery other than the original memo and those that were kept hidden from Plaintiff during her employment with them.

Defendant City provided vague and incomplete responses to Court-ordered initial disclosures regarding witnesses and documents, and then refused to identify employees that might have made statements in their

[7]This is the Fifth Defense in Defendant City's Answer [dkt. 23].

response to Interrogatories served in November 2007:

> **3. Identify by full name each employee or former employee of the Defendant City that the Defendant City, Defendant's Counsel, and/or their agents have consulted or contacted with regard to allegations and/or defenses in this lawsuit, and indicate the date of each consultation or contact, who initiated such consultation or contact, and the substance of each communication. Identification of employees contacted and the date of contact is not a violation of either attorney-client nor work-product privilege. Failure to identify employees will result in a request for sanctions.**
>
> **Answer:** Defendant objects to this interrogatory on the basis that it seeks to invade the attorney-client privilege and/or the work product doctrine.
> (Exh. 8, Ptf's First Interrog.,# 3, Defendant City, December 31, 2007).

Similarly, responses to RDPs dated December 31, 2007 indicated that Defendants still had not investigated the factual allegations by seeking statements from witnesses or even given statements themselves, three years after they terminated her.

> **1. All written or recorded statements made by you or to you in this lawsuit. This includes statements to you whether you**

sought those statements or not.

Response: Defendant has not given a statement or taken a statement in this lawsuit.

(Exh. 5-7, RDP #1, Smithson, Davis, Blayton, December 31, 2007).

With regards to the documents identified by Plaintiff in her Complaints, Defendants' Answers do not dispute the content of Plaintiff's documents in her pleadings that were offered as evidence, saying only that "those documents speak for themselves." Indeed, they do:

- The two September 1, 2004 memos-first one addressed to her subordinate that she received and one that she received at termination now addressed to her; (dkt. 28. #7 & # 9, HC dkt. 1,#4 & 6, 138/239, #46)
- The September 10, 2004 memo from Defendant Davis that states the purported counseling issue had been "dispensed with;" (dkt. 28, #8, HC dkt. 1, #5, dkt. 138, 239, #46).
- The October 27, 2004 memo from Defendant Maddock to Plaintiff's personnel file that she received on March 15, 2005 citing her for insubordination. (dkt. 28, #16, dkt. 138,239 #45).

III. Conclusion

Defendants have failed to serve perhaps the most important document in this case–their Answer to her Amended Complaint. This motion for default judgment is based on this final showing that Defendants had no intention of meaningfully litigating these cases from the start. Throughout the process, Defendants have delayed, missed deadlines, ignored Court Orders, failed to provide documents ordered by the Court and acted as if they did not understand plain language. Plaintiff had to file no less than seven motions to compel production of standard employment action documents. These actions are admissions that Defendants knew what they were did was wrong, and have spent four years covering it up.

Based on their failures as noted in previous pleadings and as cited above, coming as it does as the end of three years of litigation, default judgment is appropriate. For this reason, Plaintiff requests that the Court grant this motion for default judgment. Plaintiff will provide the necessary documentation for damages to the Court upon request.

Respectfully submitted,
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Signed this 30th day of April, 2009.